

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-1190

B  
P/S

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**United States Court of Appeals  
For the Second Circuit**

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UNITED STATES OF AMERICA,

*Appellee,*

-against-

DAVID HAIRSTON,

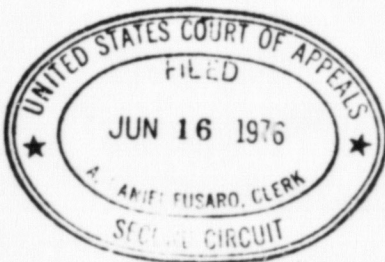
*Appellant.*

*Appeal from a Judgment of Conviction Rendered in  
the United States District Court for the Southern District of  
New York*

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**A p p e n d i x**

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Offense Adm. or <input type="checkbox"/>	District Office 0208 1	Disp./Sentence <input checked="" type="checkbox"/>	Defendant Not 02	Counts 1 & 2	MAGA CASE NO. 75-1110
U.S. CODE SECTION 21:812,841		OFFENSES Distr. & possess. of Heroin, I.		BAIL & RELEASE <input type="checkbox"/> Personal Rec <input type="checkbox"/> Denied <input type="checkbox"/> Uninsured B AMT <input type="checkbox"/> Conditional Release Set (000) <input type="checkbox"/> 10% De \$ 8,1575 <input type="checkbox"/> Surety 25 <input type="checkbox"/> Collateral <input type="checkbox"/> Bail Not Made <input type="checkbox"/> 3rd Par <input type="checkbox"/> Bail Status Changed <input type="checkbox"/> Custod (See Docket) <input type="checkbox"/> PSA	
U.S. Attorney or Asst. Thomas E. Engel (212) 791-1929		Defense <input type="checkbox"/> CJA <input type="checkbox"/> Ret. <input checked="" type="checkbox"/> Waived <input type="checkbox"/> Self <input type="checkbox"/> None <input type="checkbox"/> Other <input type="checkbox"/> PD <input type="checkbox"/> CD R. Franklin Brown 350 Bway, NYC 10013 Tel: 226-3000			
ARREST <input type="checkbox"/> U.S. Custody Began on Above Charges <input type="checkbox"/> Prosecution Deferred		INDICTMENT Information <input type="checkbox"/> 11-18-75 Waived <input type="checkbox"/> Superseding <input type="checkbox"/> Indict/Info <input type="checkbox"/>		ARRAIGNMENT Trial Set For 1st Plea <input type="checkbox"/> Not Guilty Final Plea <input type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo Guilty	
TRIAL Trial Began <input type="checkbox"/> Trial Ended <input type="checkbox"/>		SENTENCE Disposition <input type="checkbox"/> Convicted <input type="checkbox"/> On All Ch <input type="checkbox"/> Acquitted <input type="checkbox"/> On Lesser Offenses <input type="checkbox"/> Dismissed <input type="checkbox"/> WOP <input type="checkbox"/> <input type="checkbox"/> Noted/Discontinued*			
Search Warrant Issued <input type="checkbox"/> Return <input type="checkbox"/> Summons Issued <input type="checkbox"/> Served <input type="checkbox"/> Arrest Warrant 8-14-75 COMPLAINT 03-15-75 MDJ-0303 OFFENSE (In Complaint)		INITIAL/No. INITIAL APPEARANCE PRELIMINARY EXAMINATION OR REMOVAL HEARING <input type="checkbox"/> Waived <input type="checkbox"/> Not Waived <input type="checkbox"/> Intervening Indictment Tape No. INITIAL/No.		OUTCOME <input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District Ct <input type="checkbox"/> Held to Answer to U.S. District Court BOND <input type="checkbox"/> Exonerated <input type="checkbox"/> To Transfer District AT Magistrate's Initials	

Show last names and suffix numbers of other defendants on same indictment/information H. Hairston-2.		V. Excludable Delay (a) (b) (c)	
DATE	PROCEEDINGS		
11-18-75	Filed indictment.		
12-1-75	Deft. (att'y. present) Pleads not guilty. Bail (\$25,000. PRB cont'd. Case assigned to Judge Frankel for all purposes. Frankel, J.		
12-02-75	Filed the following papers rec'd from Magistrate: Docket Entry Sheet - Criminal Complaint - Disposition Sheet - Appearance Bond in the sum of \$25,000.00 w/o security & co-signed by Harry Hairston dtd 03-15-75.		
12-10-75	Filed Notice of Appearance of Atty. R. Franklin Brown, 350 Bway, NYC Tel: (212) 226-3000.		
01-26-76	Filed Govt's notice of readiness for trial on or after 01-26-76.		
02-17-76	Deft, Atty pres. Jury Trial commenced.		
02-18-76	Trial continued.		
02-19-76	Trial continued.		
02-20-76	Trial continued. Jury returns a verdict of GUILTY on both COUNTS. P.S.I. ordered. Sentence date set for April 6, 1976. Bail set at \$25,000. P.R.B., secured by \$5,000. cash. Cash to be posted by Monday, February 23, 1976, evening.—FRANKEL, J.		

(Cont'd on Page #2)

02-25-76	Filed MEMORANDUM #43936 - While no question was raised on this subject either before, during, or after the trial, it has occurred to the Court that there may be a question as to the propriety of the venue for Count One of the indictment. This question does not appear to effect Deft. Harry Hairston, who was acquitted on that count. It may affect David Hairson. In any event, Counsel for David Hairston and the Government are directed to serve and file a memorandum addressed to this ques. on or before March 29, 1976. Counsel for Harry Hairston may also file a memorandum if he is of the view that this may affect his client. It Is So Ordered....FRANKEL, J. (m/n)
03-01-76	Filed Defts Appearance Bond in the sum of \$25,000. secured by \$5,000. Cash, \$4,000. deposited on 02-24-76, Receipt #66239, and \$1,000. deposited on 03-01-76, Receipt #66506, acknowledged by the Clerk, dated 03-01-76.
03-11-76	Filed Deft's request to charge.
03-39-76	Filed Gov't request to charge.
03-29-76	Filed Gov't Memorandum of Law with respect to the venue for Ct. One on the Indictment.
3-30-76	Filed affdvt of Thomas E. Engel, AUSA, in regards to info relating to this case and thereby obviate the need for a Bill of Particulars.
4-6-76	Filed Judgment & Commitment Order- The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of THIRTY (30) MONTHS on each of COUNTS 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, Deft is placed on SPECIAL PAROLE for a period of THREE (3) YEARS on each of COUNTS 1 and 2 to run concurrently with each other and to commence upon expiration of confinement. Deft. continued on present bail pending appeal....FRANKEL, J.
4-9-76	Filed Deft's P.R.B. Pending Appeal in the sum of \$25,000. , secured by \$5,000. Cash dated 4-9-76 acknowledged by the Clerk.
4-12-76	Filed Deft's Notice of Appeal to the U.S.C.A. for the 2nd Circuit from the Judgment entered on 4-6-76. (m/copies)
4-30-76	Filed Harston's Memo. of Law in support of motion to acquit on 1st count of indictment.

A TRUE COPY  
 RAYMOND E. BURGHARDT, Clerk



TE:ko

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X 75 CRIM. 1119

UNITED STATES OF AMERICA :

INDICTMENT

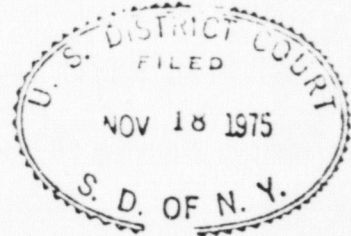
-v- :

DAVID HAIRSTON and  
HARRY HAIRSTON,

75 Cr. :

Defendants :

----- X  
COUNT ONE



The Grand Jury charges:

On or about the 23rd day of May, 1975,

in the Southern District of New York,

DAVID HAIRSTON and HARRY HAIRSTON,

the defendant s, unlawfully, intentionally and knowingly  
did possess with intent to distribute, a Schedule I  
narcotic drug controlled substance, to wit,  
approximately 80.5 grams of heroin.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

FILED  
NOV 18 1975

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of May, 1975  
in the Southern District of New York,

DAVID HAIRSTON and HARRY HAIRSTON

the defendant s , unlawfully, intentionally and knowingly  
did distribute and possess with intent to distribute a  
Schedule I narcotic drug controlled substance, to wit,  
approximately 213.9 grams of heroin.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

Walter J. Kearney  
Foreman

Thomas J. Canille  
THOMAS J. CANILLE  
United States Attorney



RECORD TRANSCRIPTS OF PROCEEDINGS  
REFERRED TO IN APPELLANT'S BRIEF

(T.224; T.226; T.346; T.235; T.241; T.238;  
T.242; T.246; T.260; T.261; T.263; T.265;  
T.267; T.428; T.448; T.459.)



1 rdkm 224

Hairston-direct

2 Q Out of the \$20,000 cash flow you have a month, how  
3 much out of that is normally profit?

4 A It is according to which items are sold. There is  
5 a larger markup on wine than there is on liquor.

6 Q Give me an average in your store.

7 A 20, possibly 25 percent.

8 Q Now, there was a time around the summer or fall of  
9 1974, and I want you to speak loud so the jury hears you.  
10 It is very important that they hear every word you say.

11 Was there a time around the summer or fall of 1974  
12 you met a fellow by the name of Safwan Salam; is that true?

13 A That's correct.

14 Q Explain to the jury the occasion of this meeting.

15 A I was with a fellow named Robbie who owns a liquor  
16 store on New York Boulevard. He asked me would I take him  
17 to Brooklyn because his car was being -- would I take him  
18 and a friend of his to Brooklyn because his car was being  
19 used to make deliveries. I said I would. I was directed  
20 to an area in Brooklyn that I wasn't familiar with and we  
21 stopped at a store on the corner. That is when I first saw  
22 Safwan. He had been standing around and he walked up the  
23 street when one of the fellows -- the other fellow that was  
24 with Robbie got out of the car. When they got out of the  
25 car Safwan and the other fellow walked away back up the

1 rdkn 226 Hairston-direct

2 Robbie's store.

3 Q Did he say anything to you at that time?

4 A He said to me, "Hey, I got some good coke. Are you  
5 interested?"

6 I said, "No, I am not into coke. It is not worth  
7 it to me and I don't want to talk about it even," and I left.

8 Q Did you see him for a long period of time after  
9 that?

10 A I did not see Safwan again until approximately a  
11 year later during the spring of 1975.

12 Q You said in March or April, somewhere in that area?

13 A Approximately.

14 Q Would you explain to the jury what brought about  
15 this meeting?

16 A I was working in my store and I had come outside  
17 and I saw Safwan walking up the street. He came up to me  
18 and I says -- and we spoke. I says, "Hey, how are you  
19 doing?"

20 He says, "I have been looking for you."

21 I said, "What is happening?"

22 He said, "I just want you to know I got some good  
23 coke connections and I can get it right off the top, and I  
24 want to know if you interested in investing any money."

25 I said, "I told you before I was not interested in



rdkm 346 Bardwell-direct

at that time to monitor his calls?

A Yes.

Q Could you tell the jury of persons he told you not to let them know he was there if they should call?

MR. WILE: Objection, your Honor, leading.

THE COURT: I will allow that.

Q Did you hear the question?

A I heard the question. It was some person that he say he wasn't there?

Q Name the person.

A Safwan.

Q Do you know Safwan?

A No.

Q Had you seen him?

A I only seen him once.

Q Mr. Bardwell, when you were working there did Harry Hairston manage or sort of work in the store?

A Yes, he managed there. Whenever we got cases in he helped out.

MR. BROWN: Thank you.

MR. WELLS: I have no questions, your Honor.

MR. WILE: Your Honor, may I have a moment to confer with somebody?

THE COURT: Yes.

1 rdkm 235

Hairston-direct

2 58th. It was a big house, a three-story house. When I  
3 walked into the house the house was immaculately decorated,  
4 wall to wall mirrors, carpet, very modern furniture, very  
5 plush and exclusive house, like it was worth a lot of money.  
6 I was taken down the basement where there was a bar and it  
7 was white carpeting in the basement, and a color TV down  
8 there and I was introduced to this guy whose name was Danny.

9 Q Speak a little louder, Dave.

10 A I was introduced to this guy named Danny. He told  
11 Danny, he says, "This is the guy I have been telling you  
12 about. I have been trying to get him to put up some money.  
13 Why don't you explain to him what is happening

14 Danny said that he had a cocaine connection in  
15 Colombia. He said he was leaving in a few days to go over  
16 there and he was looking for somebody to help him put up  
17 some money. I told him, "You got friends and why don't you  
18 get together with your friends?"

19 He said that his friends had been, all of them had  
20 been crying broke, and usually when he came back that those  
21 who purchased the cocaine off of him, he usually bought it  
22 back and cut it, or whatever, and sold it to them and doubled  
23 his money.

24 I said, "Well, look, I told Safwan before the I  
25 wasn't going to get involved in doing any dealings with any



1 rdkm 241 Hairston-direct

2 there.

3 Q Speak louder.

4 A I went over there and Danny was there. Danny  
5 showed me his passport to affirm that he had been to South  
6 America several times, and he also showed me a large sum of  
7 money, I don't know the amount, but to show that he would  
8 be investing a lot of his money. He also showed me -- no,  
9 he didn't show me, he told me that he had everything hooked  
10 up with getting the package in through Customs and that it  
11 was no problem and that if something should happen, that it  
12 was a guaranteed deal, that the package would come through  
13 anyway.

14 Q Were you convinced at one time to invest \$6,000?

15 A I did at one time. I took \$6,000 and I went to  
16 Danny's house and I -- no, Safwan came by and picked me up,  
17 or did I meet him? I believe either Safwan met me there or  
18 he came by and got me. I am not sure as to which it was,  
19 but I went there with \$6,000 that I had taken from my store.

20 Q Did you give the money to Danny?

21 A Yes, I did.

22 Q Did you leave then?

23 A Yes, I did.

24 Q And what happened then?

25 A Okay, from this point on Danny had told me that he

1 rdkm 238 Hairston-direct

2 he would make \$50,000.

3 Q When did you leave Safwan in the evening?

4 A Safwan and I proceeded back to Brooklyn to 95th  
5 Avenue, I believe, to Joey's house. When we got ther Safwan  
6 said, "I will tell you what, come in for a minute and I will  
7 call Joe to see what is happening."

8 Q Speak a little louder.

9 A He said, "I will call Joe."

10 Q Are you speaking of Hammonds now?

11 A He was referring to Garfield Hammonds. Yes, he  
12 was referring to Garfield Hammonds. He said, "I will call  
13 Joe and see what's up."

14 Now, in the house that Joey is in, Joey was staying  
15 with his brother and his sister-in-law, or his siter and  
16 brother-in-law.

17 Q You are speaking of Joey, the partner of Safwan,  
18 and when you speak of Joe you are speaking of Hammonds?

19 A I am speaking of Joey.

20 Q The partner of Safwan?

21 A Yes. He went by the name of Usaf Alief. Anyway,  
22 he had a room or something in the basement. So when we  
23 came in we came in through a side door and we went downstairs  
24 in the basement. Safwan said, "I will go upstairs and call,"  
25 because there was no phone in the basement. But from time



1 rdkm 242 Hairston-direct

2 would be gone for a few days --

3 Q You have to speak a little louder.

4 A He said that he would be gone for a few days and  
5 that approximately a couple of weeks later the package would  
6 arrive. The package never arrived and I was given excuses  
7 from time to time about it had come in and it couldn't be  
8 taken off the ship. It had come in one time and he told me  
9 the Feds had been on the ship and Safwan kept insisting that  
10 it was coming, and Danny told me it was coming. I was just  
11 given a bunch of excuses on different occasions.

12 Q Did there come an occasion that Safwan suggested  
13 an alternative?

14 A I told Safwan, "Look, you got me involved in this  
15 shit and you are responsible for my money. Look, you get  
16 my money together."

17 He told me that he would try to set something up.

18 After that he came back and told me -- he asked  
19 me did I know anyone that had any heroin because Joe was also  
20 looking for a heroin connection.

21 Q The Joe you are speaking of now is the agent?

22 A Garfield Hammonds.

23 Q All right.

24 A He said because Joe was looking for another heroin  
25 connection. I told him I didn't know anybody that was

1 rdkm 246 Hairston-direct

2 have a connect soon.

3 Then one time Robbie came by my store and he  
4 asked --

5 Q Speak to me back here so I can hear you.

6 A One time Robbie came by my store and asked me would  
7 I go with him from Brooklyn to a friend's house to a party.  
8 I got in Robbie's car and we went to 2580 Ocean Parkway in  
9 Brooklyn. When we got there I was introduced to a guy  
10 named Saul, who lived there. There was three other fellows  
11 there. Two of them I was told were Turkish guys and there  
12 was two girls there.

13 Q What happened at the party?

14 A One of the Turkish guys pulled out some aluminum  
15 foil containing what he told me was heroin. He said, "This  
16 is Turkish heroin. It costs about \$2,500 an ounce and I  
17 have got more. If you guys know anybody who is interested,  
18 let Saul know." Then the two Turkish guys left.

19 Q Did you stay there long?

20 A No. Robbie and I left shortly thereafter. We had  
21 a couple of drinks and bullshitted around a little bit, but  
22 we didn't stay there all night or nothing like that.

23 Q What happened after that?

24 A After I left I came back to my store. Robbie  
25 dropped me off and then he went home, I guess, or wherever.



1 rdkm 260 Hairston-direct  
2 money back because you keep bugging me for it. So you better  
3 come down and get the stuff.

4 Q Did there come a time you talked to Joe -- pardon  
5 me, Agent Hammonds again about some narcotics?

6 A After the first sale --

7 Q Dave, I know you are nervous and all that. It is  
8 very important for you to speak loud. I can't hear you back  
9 here so the jury can't hear.

10 A After the first sale Safwan continued to hound me.  
11 He told me his man liked the stuff and he said that he  
12 wanted some more. He told me that he was supposed -- he had  
13 been calling me several times all during this period, and he  
14 had stopped by several times and he had told me that his man  
15 liked the stuff and that he had wanted some more, and he was  
16 supposed to meet him in Manhattan the next day and let me  
17 know.

18 He called me the following day and told me that  
19 his man wanted eight more, meaning eight ounces. So he said,  
20 "Can you get it?"

21 I said, "Look, I told you before, you got me  
22 involved in this drug shit and I didn't want to get involved  
23 in it. I am just interested in getting my money back."

24 He said, "It looks like the only way you going to  
25 get your money back is to get involved in this, because with

rdkm 261

Hairston-direct

the eight more you should be able to get at least most of  
your money back."

Q Go ahead. Did there come an occasion when you  
made preparations to buy the eight more?

A I spoke to Saul and Saul and I went back to  
Manhattan and we picked up ten ounces.

Q Why did you pick up ten ounces?

A Because the Turkish guy was selling them in lots  
of five. You had to buy five or ten.

Q What did those ten ounces cost you?

A The ten ounces cost --

Q I am too fast. Where did you pick the ten ounces  
up?

A I picked the ten ounces up in Manhattan on 56th  
Street. Safwan had previously told me that if I got this,  
I would get my money back and I said that he would be able  
to mix some stuff with it and I would have -- you know, I  
would have more left over and I would be able to -- he  
could juggle that around and I would be able to see at least  
most of my money.

Q You mean cut, cut it up? In cooking you call it  
filling; is that right?

A Yes, cutting.

Q Did you purchase the narcotics?



1 rdkm 263 Hairston-direct

2 Q How many ounces did you sell to the agent at that  
3 time?

4 A Approximately eight ounces.

5 Q How much did he pay you?

6 A He paid me \$17,600 for the eight ounces, plus a  
7 balance of \$600 that he had owed me previously.

8 Q So that was --

9 A \$18,200.

10 Q How many ounces did you have left?

11 A I had ten and about six and a half or seven was  
12 used. So I had between three and four ounces left, with the  
13 way it had been mixed.

14 Q You had, say, three ounces. At this time now you  
15 had invested \$11,000, and you received 24. So you were  
16 \$9,000 in the hole at that time, weren't you?

17 MR. WILE: Objection, your Honor. I am not sure  
18 what we are calculating here. I thought we were talking  
19 about profits in heroin involving the agent. I am not aware  
20 why that \$6,000 spent on the transaction with Danny is being  
21 included here, unless we are talking about the man's overall

22 MR. BROWN: It is the testimony of the witness.  
23 I am including things he spent.

24 THE COURT: The jury knows the underlying facts,  
25 and he can calculate them the way he likes and you can

1 rdkm 265

Hairston-direct

2 A That is correct.

3 Q Now, what did you do with the drugs? Hold it for  
4 a moment.

5 Did you have occasion to talk to Mr. Hammonds  
6 about a 4 kilogram sale?

7 A Safwan had been constantly on me after the second  
8 sale. He had been hounding me every day. He had been  
9 with me, and he was with me and he told me that Tony was  
10 looking for some -- he was looking for some cocaine also  
11 because he had seen some transactions -- he had seen some  
12 transactions that Tony had made and he didn't know of anyone  
13 that had as much money as Tony had. He said he saw Tony  
14 make a purchase of some \$90,000 of cocaine, and he said he  
15 constantly saw these briefcases full of money. He told me  
16 that why didn't I, while we was waiting for -- while we was  
17 supposedly waiting for the original \$6,000 worth of cocaine  
18 to come back, why couldn't I find another connection or  
19 something for some cocaine?

20 A In the meantime while Safwan was talking about this,  
21 did Tony ask you to get 4 kil s?

22 A Yes. Safwan told me that wanted to speak to me  
23 and I went by Safwan's. He called Tony and Tony told me to  
24 meet him in Manhattan and at the Subway Inn.

25 Q Subway Inn?



1 rdkm 267

Hairston-direct

2 and we left.

3 Q Did you ever explore this? Did you tell Tony how  
4 much it would cost him to get 4 kilos?

5 A We spoke on occasion and Tony said that he wanted  
6 to pay \$200,000 for 4 kilos, and he had asked me about the  
7 price structure, and I told him I wasn't aware -- I told him  
8 I didn't know what it was.

9 Later I told him, I just assumed a figure and I  
10 told him about \$70,000, I believe.

11 Q Do you have any idea how much it would cost you in  
12 out of pocket money to buy 4 kilos at \$70,000 a kilo?

13 A At \$70,000 a kilo it would cost about \$280,000.

14 Q Did you have that kind of money to purchase 4  
15 kilos?

16 A No, I did not, I do not.

17 Q Why was it that you constantly talked to Tony  
18 about these 4 kilos over a period of two or three months?

19 A I was hoping he would eventually run out of the  
20 initial drugs he had and he would take the balance of the  
21 three ounces or a little better than three ounces that I had  
22 left, and that way I would realize at least a large portion  
23 of the money that I had lost and I would have been able to  
24 pull out and stop bothering with him and Safwan, and all of  
25 them.

1 rdkm 428

2 (Recess.)

3 THE COURT: Let me take thirty seconds of the five  
4 minutes. Can I ask you to come back at 9:15 tomorrow  
5 morning, gentlemen? Can you make that? 9:15 for the charge  
6 tomorrow morning.

7 MR. WILE: Yes, your HONor.

8 MR. BROWN: Yes, your Honor.

9 (In open court, jury present.)

10 MR. WILE: May I proceed, your Honor?

11 THE COURT: Yes.

12 MR. WILE: This is the Government's last opportu-  
13 nity to address you. This is part of the trial known as the  
14 Government's rebuttal summation, and the purpose of it is to  
15 respond to the remarks made by the other attorneys. I intend  
16 to be brief.

17 Mr. Brown has told you on behalf of David Hairston  
18 that the Government has not proved that David Hairston was  
19 predisposed to commit the crimes charged in this indictment.  
20 He was not predisposed until he met Safwan to sell heroin.  
21 Judge Frankel will later tell you what the law is concerning  
22 entrapment, and it is difficult and it is complicated, but  
23 one thing that the law of entrapment does not do is require  
24 the Government to be able to prove another case. If that  
25 were the case, entrapment would be the perfect defense,



really the only area of controversy with respect to the defendant Hairston. We come to the so-called defense of entrapment. Now I say it is a so-called defense because on this, as on all the issues of this criminal case, the defendant does not have the burden of proof. He does not need to prove his defense. The defendant, in other words, is not required to prove entrapment, as I shall be defining its characteristics and its elements. It is for the Government to satisfy you beyond a reasonable doubt that in the sense of this word's definition for this purpose, there was not entrapment in this case.

David Hairston concedes that he made the sales. He concedes that he knew what he was doing. He says the Government entrapped him. And what does entrapment mean in this context? Well, the definition of this concept starts from a recognition by all of us in or out of the legal profession that some times, perhaps frequently, stealth and tricks and stratagems are necessary and proper methods employed by law enforcement officers. We all recognize, and the law recognizes, that the function of law enforcement is not only the effort to prevent crime and to apprehend people who have committed crimes, but also to undertake to detect people who are planning, intending, ready and prepared to engage in criminal conduct. So there is no

rdkm 459

tell us the score, don't tell us how the vote stands. That is a private matter for you and it is best for you and for the proper administration of the case that you not report anything of that kind.

Now, before I invite you to retire and dismiss or excuse our alternate jurors, let me see if counsel have either or different things they wish me to say. If there are exceptions gentlemen, at the side bar. Are there any?

MR. BROWN: Yes, there are, your Honor.

(At the side bar.)

MR. BROWN: In your charge you indicated that if David Hairston was ready and willing to sell drugs, they have a right to find predisposition. I want you to pinpoint that as before May 23rd and May 30th because there was a lot of testimony beyond May 30th which may or may not have any bearing at all on his state of mind on May 23rd or May 30th.

THE COURT: No, I am not going to add anything to that. They know he is charged on May 23rd. It couldn't be that he was ready and willing after.

MR. BROWN: Most of the evidence came out about May 30th and on to a bit of discussion and by far two months after that. They might confuse themselves if they think it is part of the same line.

THE COURT: I understand what you are saying, but

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COURT'S CHARGE TO THE JURY

(Pg. 434-461)

rdkm 434

UNITED STATES OF AMERICA

vs.

DAVID HAIRSTON & HARRY HAIRSTON

February 20, 1976

(In open court, jury not present.)

CHARGE OF THE COURT

THE COURT: Good morning, gentlemen, are you ready?

MR. WELLS: May I address the Court?

THE COURT: Yes.

MR. WELLS: May I apologize to the Court for the delay I have occasioned. A matter developed this morning that was unavoidable. I left my home at quarter after eight this morning.

THE COURT: Mr. Wells, I do absolutely accept your apology. I understand you have been having some family things and it is all right.

MR. WELLS: Thank you.

(Jury present.)

THE COURT: Mr. Foreman, ladies and gentlemen, first let me say that the delay this morning was unavoidable, and let me simply say that I am sorry you were kept waiting but I can't find anybody who should be required to apologize, so that is the best I can tell you.

With that let us move toward the critical ultimate



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2 point of all of this business, the time for decision by you.  
3 The case will be given to you in the next hour or so for  
4 your work in moving toward a verdict. Those of you who  
5 remember the Latin roots of words will know that verdict  
6 comes from words that add up to truth speaking. It is your  
7 task to announce in your judgment the truth of the matters  
8 here in controversy. You are the judges, as I told you  
9 when you were selected, and that means exactly what it says.  
10 It means that you are the sovereign deciders of the things  
11 that are in issue before you, the facts. It is for you to  
12 determine the truth about these controverted issues of fact.  
13 You are sovereign, and that means that it is not what the  
14 lawyers have said or what I may say, but in the end your  
15 judgment, rooted in the evidence that has been placed before  
16 you.

17 Remember what evidence is, and I won't labor that.  
18 You will be relying on the testimony and such exhibits as  
19 you have seen. You may rely on stipulated things. You  
20 remember there is a stipulation that a chemist, if he had  
21 been called, would have testified that the exhibits involved  
22 in the two counts of the indictment contain heroin, and that  
23 is not contradicted. You may employ that stipulation as  
24 part of the materials of your decision. There was a  
25 stipulation or two about the ownership of automobiles by Mr.

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2 Harry Hairston and his wife, and you may similarly accept  
3 those stipulated facts as given.

4 Beyond that, where the key issues lie it is for  
5 you to decide. It is for you to decide what evidence you  
6 credit; it is for you to decide, using your common sense,  
7 what reasonable and persuasive inferences you may or may not  
8 draw from the evidence that has been laid before you.

9 Now, these two defendants on trial here in response  
10 to the indictment against them have both entered pleas of  
11 not guilty. That means that the burden from then and  
12 throughout was placed upon the prosecution to prove guilt  
13 beyond a reasonable doubt before either of them may be  
14 convicted on either of the two counts in this indictment.

15 Now, it is a corollary of that burden of proof on  
16 the Government in our system that a defendant on trial does  
17 not have to prove his innocence. A defendant may, but need  
18 not, produce proof of any kind. A defendant may rely  
19 exclusively on his presumption of innocence. A defendant  
20 comes to court presumed to be innocent, and that presumption  
21 protects him until or unless he is proved guilty beyond a  
22 reasonable doubt.

23 Now, as another corollary of these principles,  
24 since a defendant is not required to present evidence, he  
25 obviously is entitled to decide with counsel whether or not



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2 he will himself take the witness stand. You know that one  
3 defendant decided he would testify and the other did not.  
4 As to any defendant who does not testify, it is forbidden  
5 to draw any inference of any kind against him from his  
6 decision not to take the witness stand. Drawing any such  
7 inference would violate a fundamental constitutional right.

8 Very simply let me say that in relying on the  
9 evidence you do have, you should place no significance  
10 whatever on the fact that Harry Hairston did not testify in  
11 this case.

12 Now, you have heard over and over again before you  
13 came to this courtroom, certainly, and here, the notion of  
14 proof beyond a reasonable doubt. Now, that is a basic  
15 concept for you, and so it becomes an item of attempted  
16 definition to help you understand that concept in your  
17 deliberations.

18 When we speak in this setting of proof beyond a  
19 reasonable doubt we mean, first of all, what the words  
20 literally undertake to convey. A reasonable doubt is doubt  
21 that has its basis in reason. It is a doubt that has  
22 substance and is not merely shadowy or speculative. It is  
23 the kind of doubt that arises from the exercise of your  
24 judgment and your collective common sense and your wisdom  
25 all addressed to the evidence or the lack of evidence in

1 rdkm 438

2 the case before you. It is not excuse to avoid performing  
3 an unpleasant duty. It is not a guise or pretext for  
4 extending sympathy to anyone.

5 A reasonable doubt is the kind of doubt that would  
6 cause a prudent person to hesitate before taking action in  
7 some matter of importance to himself or to herself.

8 Saying that in more words, if you, as all of us,  
9 who have a decision of consequence to make in your own  
10 personal affairs and if you then proceed coolly and objective-  
11 ly to review the factors that rationally have a bearing on  
12 that decision, and if at the end of that kind of careful  
13 deliberation you find yourself beset by uncertainty and  
14 unsure of your judgment, you have a reasonable doubt.

15 The converse of that is also true; that is to say,  
16 if you are in such a situation and you have such a serious  
17 decision to make and you proceed to the kind of objective,  
18 detached rational review I have just described, and if at  
19 the end of that you have no such uncertainty or reservation  
20 as I have mentioned, then you don't have a reasonable doubt.

21 Proof beyond a reasonable doubt does not mean  
22 proof beyond any doubt or proof to an absolute or mathematical  
23 certainty. If it meant that, then nobody could ever be  
24 convicted in any criminal case where there was an issue of  
25 fact. That is to say, without becoming metaphysical or



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2 philosophical, it is in the nature of issues about matters  
3 of fact, and most clearly about facts that lie in the past  
4 and in other people's experience, it is in the nature of  
5 such issues that they can't be proved to a mathematical or  
6 absolute certainty. So in the law, as in life, we rely on  
7 probabilities. The important point to stress, and the point  
8 of these instructions, is to help you understand that in a  
9 criminal case the required probability of guilt for conviction  
10 is very high probability, and you may convict either  
11 defendant only if in the end your minds are free of the sort  
12 of reservation and uncertainty I have talked about.

13 Now, with those basic principles in mind, as you  
14 will keep them throughout your studies together, let's come  
15 to the indictment in this case and the specific issues which  
16 are not many, but which are serious, that are presented for  
17 your determination. The indictment here, like all  
18 indictments in the Federal Court and in, I think, substan-  
19 tially all our states, rests on statutes; that is to say,  
20 there are not any Judge-made or common law crimes in our  
21 system. What conduct shall constitute a Federal crime is  
22 a matter for the Congress to determine, and it determines  
23 that by enacting laws or statutes. Now, the laws here,  
24 which none of us have to be able to recite by heart, very  
25 simply make it a crime to distribute or to possess with

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intent to distribute certain kinds of so-called narcotic controlled substances. Heroin is such a substance. While the words of the statute are more extensive than this, what you need to know basically for purposes of this case is that it is a Federal crime to sell or to attempt to sell heroin. And to do that knowingly and intentionally.

The indictment in this case has two counts; that is, it charges two separate violations of that Federal law. It is very brief and I will read it to you. Count one charges that on or about the 23rd day of May, 1975, in the Southern District of New York, Harry Hairston, David Hairston the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 80.5 grams of heroin.

Now, Count two reads the same way but it refers to a transaction alleged to have occurred on May 30, 1975, and the amount involved there is 213.9 grams of heroin, and the exact amount, of course, is not a critical matter.

Now, although the issues that you will probably realize you must determine come to a more narrow focus than this, I am going to include in these instructions what is included as a standard matter in such instructions, the so-called essential elements of this offense. I am going



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2 to instruct you now that in order to prove guilt on either  
3 of these counts, which are the same except for the time,  
4 date and amounts, the Government must have satisfied you  
5 beyond a reasonable doubt on each and every one of three  
6 essential elements, and those are as follows:

7 First, that on or about the date in question, or  
8 May 23 or the 30th as the case may be, the particular  
9 defendant you are considering distributed heroin; that is,  
10 participated in the sale of heroin.

11 Second, that the substance involved in the  
12 particular events on the particular date was in fact heroin.

13 Third, that the defendant you are considering in  
14 engaging in that conduct acted knowingly and intentionally.

15 I have already told you, and I remind you, that  
16 though the indictment and the statute, among other things,  
17 refer to the act of distributing, distributing for purposes  
18 of this case means transferring or selling. And that in  
19 fact is all that you will want to attend to.

20 What I mean by that is that the Government  
21 precisely, specifically charges on those two dates sales of  
22 heroin to the Government agent Hammonds. In order to  
23 convict either defendant you must be satisfied beyond a  
24 reasonable doubt that there were such sales. There are  
25 other things on which you have to be satisfied of course,

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2 and we will talk about them in a minute or two. But the  
3 gist of the offense, the wrongful conduct in question here,  
4 is illegal sales of heroin. So that if you are not  
5 satisfied that there were such sales on either of those  
6 occasions or that on either of those occasions one or the  
7 other defendant did not participate in sales, then to that  
8 extent you would have to return a verdict of not guilty.

9 Now, I have mentioned, of course, that there is  
10 a requirement of proof that the substance involved in the  
11 transactions about which you have heard was heroin. Again,  
12 I simply remind you that there was a stipulation as to  
13 what a chemist would have said about that, there was no  
14 dispute on that subject, no countervailing evidence.  
15 Nevertheless, you, the jurors, before you could convict must  
16 be satisfied that what was being handled was heroin on the  
17 particular occasion you are inspecting at any particular  
18 time.

19 Finally, a defendant to be convicted of this  
20 crime must be shown to have acted knowingly and intentionally  
21 and that means that before a defendant could be convicted of  
22 this offense it would have to be shown that when he sold or  
23 participated in the sale of heroin he did that knowing what  
24 he was doing, knowing that what he was dealing with was  
25 heroin, and doing it deliberately and voluntarily and



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2 purposely, not by mistake, not by accident, not as a result  
3 of coercion which made it impossible for him to act  
4 intentionally and knowingly.

5 Now, a defendant does not need to know that he  
6 was violating some particular statute with some particular  
7 section number in the Criminal Code, but in order to have  
8 acted knowingly and intentionally in this setting he must  
9 have acted, and you must be satisfied that he acted, with  
10 awareness of the general unlawful nature of his conduct.

11 Now, knowledge and intent are matters of fact, but  
12 they are matters of fact about which very commonly we do  
13 not have so-called direct evidence, the evidence of  
14 somebody's sensory reports. A person may report his  
15 knowledge, his intent, his motives and when that happens,  
16 of course that is evidence that you take into account and  
17 weigh in deciding the state of his or her knowledge or  
18 intent.

19 Commonly, instead of that or in addition to that  
20 in the courthouse and in every day life we are accustomed to  
21 relying on so-called circumstantial evidence to determine  
22 people's knowledge and intent. We look at the person, we  
23 make a judgment about what he or she knows or is capable of  
24 knowing by judging him or her, his age, apparent intelligence  
25 maturity, and so on. Then we observe the behavior of the

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person and we observe all the circumstances in which that behavior occurs. And from those facts of circumstantial evidence we decide what people know, what they intend, how they are motivated. And you will engage in that kind of inferential process here in deciding whether or not with respect to these defendants, on the occasions in question, you are satisfied beyond a reasonable doubt that they took whatever action they took knowingly and intentionally.

Now, having covered the three necessary essential elements, all of which need to be proved before there can be a conviction of these defendants, I come to what you know, having heard the summations yesterday and having listened to this case as carefully as you did, I come to what you know are more precise and specific, more narrowly defined questions that you will be considering when you go to the jury room. You have here two separate individual defendants. You have learned that they are brothers, but for our purpose their separateness, individuality are quite important. That is to say, we don't follow in our system notions of guilt by association or by familial relationship. These two defendants are on trial as individuals and each of them must be considered by you individually in determining the serious question of guilt or innocence. And that is perhaps highlighted for you in this particular case by the distinct



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and separate and different character of the defenses with which these individuals meet the charges against them.

As you know, as to the defendant Harry Hairston, his defense is that the Government has simply failed to prove beyond a reasonable doubt that he was a knowing participant in any illegal sale of heroin on either of the occasions covered by the indictment.

As to David Hairston, he conceded that he made two sales of heroin on the two dates in question. He concedes that he did that knowingly and intentionally, but he contends that he was entrapped into doing that. He says that he must be acquitted because the Government has failed to produce evidence sufficient to overcome beyond a reasonable doubt his defense of entrapment, and I will be talking to you about that in some length in a couple of minutes.

Now, as to Harry Hairston, you have heard the essential elements and you know the arguments on the evidence, and those are basically the things you consider when you determine whether there has been proof beyond a reasonable doubt of his guilt on either of the two counts. There are a couple of other matters of law, however, to mention with respect to the Government's claim against defendant Harry Hairston. Among other things, as to that defendant the Government relies on the doctrine of aiding

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2 and abetting. That is not very complicated, but I must  
3 instruct you about it so you understand the position with  
4 respect to this. There is a Federal statute, as there is  
5 a statute in substantially every state, that provides that  
6 if anybody aids or abets or counsels or procures the  
7 commission of an offense by somebody else, then that aider  
8 or abettor or assister or procurer is equally guilty with  
9 that somebody else, the somebody else being called in  
10 lawyers' language a principal. So if one person commits an  
11 offense and a second person is found to have aided or  
12 abetted or assisted in committing that offense knowingly  
13 and intentionally, then that second person is equally guilty  
14 with the first.

15 Now, what is an aider and abettor? Obviously a  
16 mere spectator or bystander is not an aider and abettor.  
17 Somebody who knows an offense is being committed and observes  
18 its commission is not an aider and abettor. What must be  
19 shown to prove aiding and abetting is that the person in  
20 question was a knowing participant in the commission of the  
21 offense. To determine then whether somebody was an aider  
22 and abettor, to determine whether Harry Hairston in this  
23 case should be deemed to have been an aider and abettor, you  
24 ask yourselves these questions: Did he associate himself  
25 with the illegal venture? Did he participate in it as



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2 something he wished to help to bring about? Did he seek by  
3 his actions to help to make it succeed? If he did, then he  
4 is an aider and abettor. Otherwise he is not.

5 The Government relies on one other principle in  
6 its case against Harry Hairston, a somewhat related and  
7 perhaps somewhat similar principle, and that is the doctrine  
8 that if two people join together in a common or joint  
9 enterprise and work together toward its fulfillment, then  
10 they become agents for each other in carrying out that joint  
11 venture. If there is such a joint venture, then the acts  
12 of one member in furtherance of the common enterprise are  
13 deemed to be the acts of all, and all are responsible for  
14 such acts.

15 So specifically, if you find that a joint venture  
16 for the selling of heroin existed between these two  
17 defendants, then the acts of one done during the existence  
18 of that enterprise and in furtherance of that enterprise  
19 may be considered as binding evidence against the other one  
20 as well.

21 Now, remember they must be acts that occur during  
22 the joint venture and acts that are done in order to further,  
23 to carry out the joint venture. This notion can only be  
24 applied to conduct of that nature.

25 Now, we come to the central, and as you have heard,

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really the only area of controversy with respect to the defendant Hairston. We come to the so-called defense of entrapment. Now I say it is a so-called defense because on this, as on all the issues of this criminal case, the defendant does not have the burden of proof. He does not need to prove his defense. The defendant, in other words, is not required to prove entrapment, as I shall be defining its characteristics and its elements. It is for the Government to satisfy you beyond a reasonable doubt that in the sense of this word's definition for this purpose, there was not entrapment in this case.

David Hairston concedes that he made the sales. He concedes that he knew what he was doing. He says the Government entrapped him. And what does entrapment mean in this context? Well, the definition of this concept starts from a recognition by all of us in or out of the legal profession that some times, perhaps frequently, stealth and tricks and stratagems are necessary and proper methods employed by law enforcement officers. We all recognize, and the law recognizes, that the function of law enforcement is not only the effort to prevent crime and to apprehend people who have committed crimes, but also to undertake to detect people who are planning, intending, ready and prepared to engage in criminal conduct. So there is no



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prohibition against devices or ruses employed for that purpose in and of themselves.

It is also clear that that kind of lawful and legitimate function does not include the manufacturing of crime. The defense of entrapment then is based on the policy of the law not to ensnare or entrap innocent people; that is, people who are not ready or disposed to commit crimes, into the commission of criminal actions. So the basic features of this doctrine of entrapment are, first, that the design, the idea of committing the crime in question originated with a law enforcement officer rather than with the defendant; and second, and the second must also exist, that the defendant in question had no previous disposition or preparedness or readiness to commit that offense or that kind of an offense. There is entrapment then, if a Government agent or a law enforcement officer implants in the mind of an innocent person a disposition to commit the alleged offense and instigates and incites the commission of the offense in order then to bring about the arrest and prosecution of that person.

Now, if Government officers or agents simply afford a favorable opportunity or facilities or an occasion to a defendant for the commission of some crime, such conduct on the part of the agents does not of itself constitute

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(11)

1 entrapment. Entrapment occurs only if the criminal conduct  
2 is the product of the Government's own creative activity and  
3 solely the product of that, without a pre-existing  
4 disposition or readiness on the part of the defendant in  
5 question to engage in that sort of criminal conduct.  
6

7 The fact that there is a request by a Government  
8 agent of someone to engage in criminal conduct is not in  
9 itself entrapment and is not certainly the excuse or an  
10 excuse for that person's engaging in that kind of conduct.  
11 If a person is merely asked to commit a crime and goes ahead  
12 and does it, that may raise the question of possible  
13 entrapment, but it only raises the question and when that  
14 question arises the next issue, and then thereafter the key  
15 issue, is whether that defendant before the inducement or  
16 the opportunity was presented, was a person ready or willing  
17 to commit that crime, in which case there is no entrapment;  
18 or whether, on the other hand, the action of the Government's  
19 agents planted the idea in the mind of a person who was not  
20 ready and willing to commit the crime, thus creating the  
21 crime, thus giving rise to this defense of entrapment.

22 Now, as you consider this problem, for purposes of  
23 this case you may consider as Government agents the informant  
24 Safwan Salam, as well as the Drug Enforcement Special Agent,  
25 Mr. Hammonds. You will consider their actions, whatever you



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find them to have been, and you know there is dispute about that, you will consider their actions along with the actions of the defendant David Hairston and all the circumstances in which these actions occurred in determining this central key decisive issue with respect to David Hairston, the question of entrapment.

To defeat this defense of entrapment the Government must have persuaded you beyond a reasonable doubt of its version on this subject. It must have persuaded you, that is to say, that David Hairston was a person ready and willing to engage in the criminal conduct with which he is charged or, as you have heard it said, that he was a person predisposed to commit that kind of offense.

As I have said, the defendant need not prove this defense. It is for the Government to prove that the defense of entrapment has not been made out, and if you are not satisfied of that beyond a reasonable doubt you must acquit David Hairston.

On the other hand, if the Government has satisfied you that the defendant was ready and willing to engage in the selling of heroin and that a Government agent or agents simply provided a favorable opportunity for that, then you may find that what those agents did was no more than the supplying of what appeared to be an appropriate or convenient

1 rdkm 452

2 occasion for criminal activity in which David Hairston was  
3 already prepared, willing, ready to engage.

4 If the circumstances as you reconstruct them are  
5 of this nature, you may conclude that the Government did not  
6 seduce an innocent person but only provided a means for the  
7 commission of the crime and you may find that the defense  
8 of entrapment has been defeated and you may convict David  
9 Hairston as he is charged in the indictment.

10 Now, you may well find with respect to that  
11 subject, the subject of entrapment, as well as the other  
12 genuinely disputed issues in this case, that the ultimate  
13 decision of them comes down to a decision of questions of  
14 credibility, a decision as to whether you believe the  
15 Government's witnesses or the defense witnesses as their  
16 testimony relates to and purports to reveal the facts about  
17 the particular issues in question.

18 I am sure I must have mentioned to you on the day  
19 you were impaneled, that it is a standard task of juries to  
20 make such decisions, to decide issues of credibility, to  
21 decide which witnesses to believe and to what extent and to  
22 what purpose. And so I think it is fair to say the case  
23 may well come to that when you take it with you, following  
24 your oaths, and consider it in the jury room. Although it  
25 is a standard task of jurors in the courthouse, the decision



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2 of questions of credibility is not a technical, legal  
3 subject. It is not thought in our system that lawyers and  
4 judges have any special skill or expertise in deciding such  
5 questions. And based on our notions about that we bring to  
6 the courthouse people like yourselves, mature citizens who  
7 are normally not expert in the law, expecting that you will  
8 bring to this serious responsibility your collective  
9 experience and common sense and wisdom in appraising people  
10 and in deciding the serious questions of life. And you will  
11 plan to do that here. You will be recalling these witnesses  
12 as they came before you and you will be asking yourselves  
13 how each one impressed you. Did the witness seem to be  
14 candid and forthright, frank, open, or did the witness for  
15 any reason seem shifty and evasive, uncertain, doubtful?  
16 Did the witness seem to know what he was talking about, and  
17 more importantly, did he seem to intend to tell you  
18 accurately what he meant? - You want to compare the direct  
19 examination with the cross examination. You will want to  
20 recall whether there were any contradictions within any  
21 witness's testimony. You will want to estimate the  
22 contradictions between the testimony of one witness and  
23 another. You will bring your common sense to this, as I  
24 have said, and you will want to consider how plausible or  
25 reasonable or likely any particular account of a set of

1 rdkm 454

2 circumstances is or in the setting in which these stories  
3 are told, you will want to ask yourselves how implausible,  
4 how unlikely or improbable some particular account seems to  
5 you to have been.

6 You will consider all manner of things, obviously,  
7 just as you always do when you are trying to decide whom to  
8 believe and how far to believe him or her. You may, you  
9 probably will, take into account any possible interest of  
10 a particular witness. You would know, whether I mention it  
11 to you or not, that a law enforcement officer, any Government  
12 person, has an interest in vindicating his or her view of  
13 the facts on which he or she may have taken official action.  
14 You will know certainly that a defendant who takes the  
15 witness stand has a very deep and abiding and important  
16 interest in the outcome of a criminal prosecution against  
17 him. You will know from your experience that people who  
18 have an interest may have reason and may succumb to that  
19 reason to shade or conceal the truth.

20 At the same time you will know that the mere fact  
21 that somebody is interested does not mean we should not  
22 believe him. If that simple proposition were correct, we  
23 would handle this very well. We wouldn't allow anybody who  
24 is interested to testify. Obviously we do, and we must hear  
25 the testimony of interested people because they are the ones



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2 who know about the events and we simply take interest into  
3 account, along with the multitude of other things, in  
4 resolving questions of credibility.

5 If you find that a witness has testified about  
6 something falsely or inaccurately, you will want to consider  
7 the nature of the falsity or the inaccuracy. Does it relate  
8 to something central in the case or is it a relatively minor  
9 detail? You will think of things like that in deciding whom  
10 you believe and to what extent. If you find that any  
11 witness has willfully testified falsely to you about any  
12 material thing in the case, then it is part of your sovereign  
13 prerogatives and part of your sensible judgment, if you so  
14 conclude, to reject all the testimony of that witness, or  
15 in doing your task, which is finding the truth, you may  
16 credit such parts of that witness's testimony as you conclude  
17 should be credited and should be accepted in making your  
18 judgment.

19 I think we must have talked about it when you were  
20 impaneled, in fact I remember we did talk about it, remember  
21 that all witnesses start out before you as equals. Nobody  
22 has extra credit or carries a burden of blame or unlikelihood  
23 or responsibility because of who he is or because of who  
24 called him. Government witnesses and defense witnesses are  
25 alike in this respect as they take the witness stand. It is

1 rdkm 456

2 for you to judge each one as an individual and make  
3 individual determinations of credibility, using the kinds  
4 of considerations I have mentioned and all the other  
5 considerations that you may suggest to each other and that  
6 may come to your minds as you deliberate about this case.

7         There has been some argument about the fact that  
8 the informant, Saiwan Salam, did not appear as a witness.  
9 I have a couple of very brief comments on that subject.  
10 First, I report to you that it is stipulated, agreed,  
11 undisputed between the parties that the Government's agents  
12 tried to locate this informant for purposes of this case  
13 and were unable to locate and bring him here.

14         Second, so far as the law is concerned, if you are  
15 concerned about any person who did not appear here as a  
16 witness you will know that if a witness was equally available  
17 or equally unavailable to both sides in a case, you are free  
18 to infer, if your judgment leads you in that direction, that  
19 the testimony of such a person would have been favorable  
20 either to the Government or to the defense or in some way  
21 to both or in some way to neither. It is within your  
22 province, if your judgment leads you to that, to determine  
23 that you will draw no inference of any kind from the absence  
24 of any particular person from the witness stand in this case.  
25 You may conclude, in other words, and this, as I say, is for



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2 your judgment, that your most prudent course is to rely on  
3 the testimony you have heard rather than to speculate or  
4 seek inferences about testimony that you have not heard.

5 Now, I approach the end of these instructions and  
6 let me just say a few words about how you will conduct your  
7 deliberations and things that will go on while you are  
8 together in the jury room. These may be obvious things,  
9 but it is thought that it does not hurt to remind you of  
10 them. When you go to the jury room there will be twelve,  
11 and the theory of such a group obviously is that you will go  
12 there to reason together about this case. That means that  
13 each of you will feel not only that you have the right but  
14 that you have the duty to contribute your own thoughts and  
15 your own wisdom to the performance of justice in this case.  
16 By the same token each of you will go there prepared to  
17 listen courteously and attentively to the views of your  
18 fellow jurors. If you have an opinion at some stage of the  
19 proceedings and later as a result of rational discussion  
20 you are made to believe that that opinion is wrong, don't  
21 hesitate to change it. At the same time, if you have an  
22 opinion that you hold in good conscience you won't feel  
23 obliged or even entitled to change it just because you  
24 happen to be outnumbered or outweighed at some particular  
25 moment.

1 rdkm 458

2 I think you know that in order to reach a verdict  
3 on either count against either defendant the jury must be  
4 unanimous. That unanimous vote, however, should incorporate  
5 and reflect the individual judgment and the individual  
6 conscience of each member of the jury.

7 If when you are deliberating you feel you want to  
8 hear any of the evidence again or you need to see any of the  
9 exhibits, send a note through your foreman and we will  
10 proceed to take care of that. I would urge you not to  
11 proceed instantly. A main reliance of this system is on  
12 your collective memory and collective appraisal, and we hope  
13 you will resort to that as your first course rather than  
14 re-hearing things. But if you need to re-hear things,  
15 anything, tell us about it; counsel will proceed to look  
16 for it with me and when we find it we will give it to you.

17 There are two counts and two defendants. They are  
18 separate individuals as I told you, and that means, strictly  
19 speaking, you have four decisions to make for each defendant  
20 on each of the two counts. In our system, in this courthouse  
21 we normally have the verdict delivered orally in the court-  
22 room by the Foreman, so that if and when you reach a verdict  
23 we will ask you to do that and deliver it in that fashion.

24 If while you are deliberating you have occasion  
25 to send us a note and at that time you are divided, don't



1 rdkm 459

2 tell us the score, don't tell us how the vote stands. That  
3 is a private matter for you and it is best for you and for  
4 the proper administration of the case that you not report  
5 a thing of that kind.

6 Now, before I invite you to retire and dismiss  
7 or excuse our alternate jurors, let me see if counsel have  
8 other or different things they wish me to say. If there are  
9 exceptions, gentlemen, at the side bar. Are there any?

10 MR. BROWN: Yes, there are, your Honor.

11 (At the side bar.)

12 MR. BROWN: In your charge you indicated that if  
13 David Hairston was ready and willing to sell drugs, they  
14 have a right to find predisposition. I want you to pinpoint  
15 that as before May 23rd and May 30th because there was a lot  
16 of testimony beyond May 30th which may or may not have any  
17 bearing at all on his state of mind on May 23rd and May 30th.

18 THE COURT: No, I am not going to add anything to  
19 that. They know he is charged on May 23rd. It couldn't  
20 be that he was ready and willing after.

21 MR. BROWN: Most of the evidence came out about  
22 May 30th and quite a bit of discussion went on for two  
23 months after that. They might confuse themselves that this  
24 is part of the same line.

25 THE COURT: I understand what you are saying, but

1 rdkm 460

2 in the Government summation I don't think Mr. Wile mentioned  
3 anything after May 30th. If he did, it was not much and both  
4 of you made clear that the gist was May 23rd and May 30th.

5 MR. BROWN: The jury is more impressed with your  
6 determination than with any summation I may have made.

7 THE COURT: I think they have it.

8 Do you have any problem on this score, Mr. Wile?

9 MR. WILE: No, your Honor.

10 THE COURT: I don't think I will mention it.

11 Anything else?

12 MR. BROWN: Nothing else.

13 THE COURT: Do you have an exception, Mr. Wells?

14 MR. WELLS: No exceptions.

15 THE COURT: Mr. Wile?

16 MR. WILE: No.

17 (In open court.)

18 THE COURT: Now, Mr. Gregory, Miss Bonifacio, your  
19 colleagues all seem to have survived and remained in good  
20 health, so it becomes my privilege and duty to thank you for  
21 being here, and now to excuse you from further attendance in  
22 this case, and to give you the good news that if you go back  
23 to Room 109 they may have other opportunities for you to do  
24 justice. Thank you very much and good morning to both of  
25 you.



1 rdkm 4 1

2 (Alternate jurors excused.)

3 THE COURT: Now we will have the marshal sworn.

4 (Marshal is sworn.)

5 (The jury commences deliberations  
6 at 10:35 a.m.)

7 THE COURT: Gentlemen, let me say that Mr.  
8 Swanciger will tell you our procedure in handling notes,  
9 which are usually shown to you as I am making my way to the  
10 courtroom. He will inform you when the jury goes to lunch  
11 and I request that you find out where they are going and go  
12 to some more interesting place in the neighborhood. For the  
13 rest we just stand by.

14 MR. WELLS: Your Honor, one thing further if I may.  
15 I had talked with my client, Mr. Harry Hairston, about this  
16 yesterday, and will ask the Court if I can have this  
17 opportunity to avail myself today, in the event the jury  
18 in their deliberations will exceed past three or four in the  
19 afternoon, I have made arrangements for another attorney  
20 from my office to come in my stead to remain with Mr.  
21 Hairston so I can go and attend to some personal matter  
22 that is in New Jersey.

23 THE COURT: Well, is your colleague sufficiently  
24 informed or will he be so that he can help Mr. Hairston and  
25 me with any problems that come up in the deliberations?

A-51

MEMORANDUM OF COURT

(#43936)

-E-



DAVID HAIRSTON and  
HARRY HAIRSTON,

Defendants.

75 Cr. 1119 (MEF)

MEMORANDUM

FRANKEL, D.J.

While no question was raised on this subject either before, during, or after the trial, it has occurred to the court that there may be a question as to the propriety of the venue for Count One of the indictment. This question does not appear to affect defendant Harry Hairston, who was acquitted on that count. It may affect David Hairston. In any event, counsel for David Hairston and the Government are directed to serve and file a memorandum addressed to this question on or before March 29, 1976. Counsel for Harry Hairston may also file a memorandum if he is of the view that this may affect his client.

It so ordered.

Dated, New York, New York

February 25, 1976

U.S.D.J.

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RECORDED

FEB 26 1976

21  
FEB 26 1976  
WM

#48936

JUDGMENT AND COMMITMENT ORDER



**JUDGMENT AND PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government  
the defendant appeared in person on this date

APRIL 6 1976

**COUNSEL**

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired counsel appointed by the court and the defendant thereupon waived assistance of counsel

☒ WITH COUNSEL

R. FRANKLIN BROWN, ESQ.

(Name of counsel)

**PLEA**

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

**FINDING & JUDGMENT**

There being a finding/verdict of   
 ☐ NOT GUILTY. Defendant is discharged   
 ☒ GUILTY, as to counts 1 and 2.

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly possessing with intent to distribute, a Schedule I narcotic drug controlled substance. (Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(A).).

Unlawfully, intentionally and knowingly distributing and possessing intent to distribute a Schedule I narcotic drug controlled substance (Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(A).).

**SENTENCE OR PROBATION ORDER**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY (30) MONTHS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of THREE (3) YEARS on each of counts 1 and 2 to run concurrently with each other and to commence upon expiration of confinement.

Defendant continued on present bail pending appeal.

**SPECIAL CONDITIONS OF PROBATION****ADDITIONAL CONDITIONS**

In addition to the special conditions of probation set forth above, the court ordered that the special conditions of probation set forth in the attached exhibit be complied with by the defendant during the period of probation. The defendant is hereby notified that failure to comply with the special conditions of probation may result in revocation of probation and imprisonment for the full term of the sentence.

The court orders compliance with the special conditions of probation set forth in the attached exhibit.

It is ordered that the Clerk of the Court be and he is hereby directed to prepare and transmit to the defendant a copy of this judgment and probation order.

SECRETARY

☒ BY

CLERK OF COURT

MARVIN E. FRANKEL

**BEST COPY AVAILABLE**

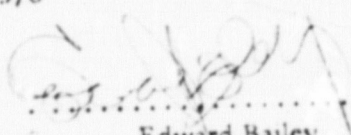
Date April 6, 1976

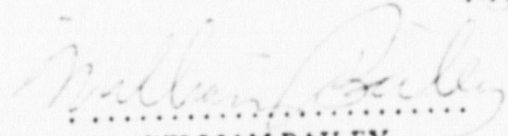
AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,  
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of June, 1976 at No. 1. St. Andrews Pl., NYC deponent served the within Appendix upon U.S. Atty., So. Dist. of NY 31 the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,  
this 16 day of June 1976

  
.....  
Edward Bailey

  
.....  
WILLIAM BAILEY  
Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1977